grant a Mareva to decide whether, if I had power to do so, I would have been satisfied that the plaintiffs have established a case for the granting of an injunction on the merits.

I have already decided, in another application for an injunction by the plaintiffs, that they have a good arguable case, which should properly be the subject of an injunction.

However, before a Mareva is granted (if it is possible to do so) it is for the plaintiffs to show that there is a substantial risk that a judgment in favour of the plaintiffs would remain unsatisfied because the defendants will remove their assets from the jurisdiction, or will dissipate their assets within the jurisdiction.

The defendants are not a foreign company, but one registered in Brunei. They carry on other businesses here, among them property development, construction work and the leasing of lorries. None of its businesses appears to be conducted out of the jurisdiction. All its activities, assets and work are within the jurisdiction.

The largest director is a Brunei citizen and thus likely to remain here, as is the company itself. The shareholding of this director has increased, and that of Taiwan nationals has decreased in the past three years.

There is no evidence that, in the past, the company has sought to remove substantial assets from the jurisdiction, although a majority of its shareholders and directors are nationals of Taiwan. In this respect, there is nothing more than a bare allegation by the plaintiffs that this is possible.

An injunction of this nature is a matter of discretion. It must be given sparingly, since its effect may be deleterious to the interests of the defendants.

Assuming that the plaintiffs will recover judgment against the defendants, I do not find there to be sufficient evidence that the latter's assets might be removed from the jurisdiction, or disposed of within it so as not to be traceable or available when judgment is given: see *Rahman* v *Abu Taha*.[10]

Consequently, even if I had decided that it was open to me to issue a Mareva injunction, I would have refused to do so on the merits of the application by the plaintiffs.

The defendants should have the costs of the hearing before the chief registrar and of this appeal.

Costs should be taxed if not agreed.

Order accordingly.

Solicitors: *Bonds*; *DF Abang Zen.*

Reported by *Al-Mansor Adabi*

MALAYSIAN REPORTS

Vasan Singh v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CRIMINAL APPLICATION NO 1 OF 1988
ABDUL HAMID AG LP, HASHIM YEOP A SANI AND HARUN SCJJ
19 JULY AND 14 OCTOBER 1988

Criminal Procedure – Alibi – Defence of – Bare denial of charge – Whether notice has to be given – Criminal Procedure Code (FMS Cap 6), s 402A

In this case the applicant had been charged with voluntarily causing hurt under s 323 of the Penal Code (FMS Cap 45). The applicant in his defence said that he was asleep at the time of the incident. He heard noises and came out and saw some persons injured. At the trial the prosecution objected to the defence of alibi alleged to be put up by the applicant as no notice had been served on the prosecution under s 402A of the Criminal Procedure Code (FMS Cap 6). The trial magistrate agreed and in his grounds of decision he said he excluded the defence. In the event he found the applicant guilty and convicted him. The appeal of the applicant was dismissed in the High Court and he thereupon applied for the following question to be referred to the Supreme Court: Is an accused person, who gives evidence on his own behalf of a defence of alibi but who proposes to call no other witnesses in support thereof, obliged to give notice under s 402A of the Criminal Procedure Code.

Held:

(1) A distinction should be drawn between a bare denial and an alibi defence. Evidence of a bare denial is in any case always admissible. In order to distinguish one from the other the court must know the nature of the evidence.

(2) It follows that initially the court cannot prevent an accused person from giving evidence. Having heard the evidence, the trial court must then decide the nature of the evidence. If it is only evidence of a bare denial the evidence stays. If it is evidence in support of an alibi and no notice under s 402A has been given, then he must exclude that part of the evidence from his consideration of the defence evidence.

(3) On the facts of this case both the trial magistrate and the appellate judge were in error in excluding the applicant's evidence that he was not involved in the fight and that he was in bed at the material time because this was not evidence of an alibi but a mere denial. Be that as it may, there was ample evidence to support the conviction and there are therefore no grounds to make any other order.

(4) The answer to the question referred to the court is in the affirmative provided that the evidence is in support of his alibi and not a bare denial.

Cases referred to

1 *PP* v *Lim Chen Len* [1981] 2 MLJ 41 (refd)
2 *Ku Lip See* v *PP* [1982] 1 MLJ 194 (refd)
3 *Hussin bin Sillit* v *PP* [1988] 2 MLJ 232 (refd)
4 *Rangapula* v *PP* [1982] 1 MLJ 91 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 402A
Penal Code (FMS Cap 45) s 323

Jagjit Singh for the applicant.
Stanley Isaacs (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Harun SCJ (delivering the judgment of the court): This is a reference under s 66 of the Courts of Judicature Act 1964 on the following question:

> Is an accused person, who gives evidence on his own behalf of a defence of alibi but who proposes to call no other witnesses in support thereof, obliged to give notice under s 402A of the Criminal Procedure Code.

The applicant was charged in the Magistrate's Court at Bentong with voluntarily causing hurt to one Markhan Singh a/l Dhan Singh ('the complainant') on 16 January 1983 at about 10.45 pm in the compound of house No KT 270 Kg Ketari, Bentong, under s 323 of the Penal Code (FMS Cap 45). The applicant lives at No 271. At about 2 pm that day, the complainant erected a nine feet high zinc fence thus blocking the window of the applicant's kitchen. An attempt was made later that day to pull the fence down. The police were called in at about 7.30 pm who advised them not to quarrel. At about 10.30 pm the complainant heard banging and breaking noises coming from the zinc fence. A free-for-all ensued in the compound of No 270 between the occupants of No 270 and 271. In all there were about ten persons involved in the fight. Several of them were injured. By the time the police arrived a second time at about 11.10 pm the fight was over but they found several blood-stained weapons and blood in the compound of No 270.

The occupants of both houses are related, the principal occupants being brothers and their families. According to the complainant it was the applicant (a brother) who struck him with a weapon which looked like a sickle. He warded off the blow but cut his left thumb. According to the applicant, however, he went to bed at about 10 pm. At about 11 pm he heard noises and came out and saw Gian Singh and Dalbir Singh who were in his house covered with blood. He asked them what had happened and Gian Singh said they had been attacked by his uncle ('the complainant') and son. The police arrived and took them to hospital.

At the trial, the prosecution objected to the defence of alibi put up by the applicant on the ground that no notice had been served on the prosecution under s 402A of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). The trial magistrate agreed and in his grounds of decision said he excluded this defence. In the event he found the applicant guilty, convicted him of the offence and sentenced him to one day's imprisonment and fine of $300 in default four months' imprisonment.

The applicant appealed against conviction and sentence on the ground that his defence of alibi was wrongly excluded. It was submitted that no notice under s 402A was necessary where there was no intention to call witnesses other than the accused person himself. The appellate judge did not agree and dismissed the appeal. Section 402A of the CPC reads:

> (1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused shall have given notice in writing thereof to the Public Prosecutor at least ten days before the commencement of the trial.
>
> (2) The notice required by subsection (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

In *PP* v *Lim Chen Len*[1] the accused was charged with extortion under s 384 of the Penal Code alleged to have been committed in Kuala Lumpur. The defence was one of alibi. The accused gave evidence on oath that at the material time he was in Slim Village, Perak. Four witnesses gave evidence in support of the alibi. The prosecution objected to the admission of such evidence as no notice had been given under s 402A of the CPC. The trial magistrate overruled the objection on the ground that the failure to serve the ten days' notice is an irregularity and not an illegality which is curable by s 422 of the CPC. On appeal, it was held that the provisions of s 402A(1) are evidential and not merely procedural and as no pre-trial written notice had been given, no evidence in support of a defence of alibi can be admitted in evidence. At p 42 of the judgment, Azmi J (as he then was) said:

> As to the extent of the applicability of s 402A(1), I am of the view that the words 'evidence in support thereof' includes evidence of alibi given by the accused himself if he elects to give evidence on oath. Although the words 'evidence in support of an alibi' have not been statutorily defined in the Criminal Procedure Code, it can be taken to mean evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission. The provision of s 402A(1) which, inter alia, requires the pre-trial notice under sub-s (1) to include particulars of the place where the accused claims to have been at the time of the commission of the offence, supports my view that the provision of s 402A(2) also applies to an accused person where he elects to be a witness and gives sworn evidence.

PP v *Lim Chen Len*[1] was approved by the Federal Court in *Ku Lip See* v *PP*[2] as follows at p 196:

> We have noted what Azmi J said in *PP* v *Lim Chen Len* [1981] 2 MLJ 41 concerning the admissibility of evidence in support of defence of alibi and we are of the view that he decided correctly.

In *Hussin bin Sillit* v *PP*[3] the Supreme Court said at p 234:

> ... it is clear law that where the defence is an alibi then, any evidence in support of that defence must be excluded unless notice is complied with. As was held in *Lim Chen Len* [1981] 2 MLJ 41 and approved by *Ku Lip See* [1982] 1 MLJ 195 and also ruled by the learned judge himself in *Rangapula* [1982] 1 MLJ 91, the court has no discretion to waive pre-trial notice where the evidence to be adduced by the defence is evidence in support of a defence of alibi.

Section 402A was added to the Criminal Procedure Code in 1976. Until then, accused persons were free to put up an alibi defence and to call witnesses in support of the alibi thus creating an element of surprise at the trial. The object of s 402A is aimed at this mischief. It seeks to deprive accused persons of the privilege of keeping back a defence of alibi until the last moment. Clearly the object is to prevent the accused person from keeping back not merely the names of any witnesses he might call in support of the alibi, but also the fact that an alibi is to be raised.

The question is, has the legislature achieved these objectives in s 402A. There is certainly now abundant authority that if witnesses are to be called in support of an alibi defence, then the requirements of a pre-trial notice must be complied with – strictly. What then is the position where the accused himself is the only witness to the alibi. It is obvious, however, that an alibi defence will not be a simple statement of: 'I did not do it. I was not there. I was elsewhere.' That would be evidence of a bare denial. To establish his alibi, the accused must disclose where he was at the time of the alleged offence and what he was doing. He could be travelling at the time and the only evidence he has is a ticket or an endorsement on his passport or, as here, he was in bed. That would be *evidence in support* of his alibi. The question is whether the words *seek to put forward* in s 402A(1) include the case where the accused himself gives evidence. An accused who gives evidence himself clearly does because he is seeking to put forward evidence tending to show that he was elsewhere at a particular time. And that evidence is the *evidence in support* referred to in the subsection. We are therefore of the view that the words of s 402A(1) given their natural meaning include the case where the accused alone is to testify that he was elsewhere at the material time. Thus, sub-s (1) standing by itself clearly means that notice must be given in all cases of an alibi defence, otherwise the evidence will be excluded. No distinction is made between an alibi defence of the accused alone and an alibi defence supported by witnesses. Subsection (2) sets out the particulars required in such a notice which is in two parts:

(a) particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged; and
(b) the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

If the accused does not intend to call any witnesses, then he need only comply with part (a) of the notice.

The primary purpose of an alibi notice is to alert the prosecution to the fact that an alibi might be relied upon so that they may have the opportunity *before the trial* of making such investigations as they think fit. It may well be that the alibi is in fact true in which event the prosecution will either withdraw the charge or offer no evidence in the case.

The defence of alibi is a legitimate defence and in fact is often the only evidence of an innocent man. The difficulty, it seems to us, is when and how to exclude an alibi defence for non-compliance with s 402A. First, a distinction should be drawn between a bare denial and an alibi defence. Evidence of a bare denial is in any case always admissible. In order to distinguish one from the other, the court must know the nature of the evidence. As was said in *Ku Lip See* v *PP*[2] at p 196:

> If a trial court *having considered the evidence* put forward by the defence holds that such evidence amounts to evidence in support of an alibi for which no notice under s 402A of the Criminal Procedure Code has been given, then he has no discretion in the matter but to exclude such evidence. (Emphasis supplied)

It follows that, initially, the court cannot prevent an accused person from giving evidence. Having heard the evidence, then the trial court must decide the nature of the evidence. If it is only evidence of a bare denial, the evidence stays. If it is evidence in support of an alibi and no notice under s 402A has been given, then he must exclude that part of the evidence from his consideration of the defence evidence.

In the instant case, the trial magistrate correctly recorded the evidence of the applicant but was wrong to exclude it from the defence evidence because what the applicant said (that he was not involved in the fight and was in bed) is a bare denial of the charge. Had the applicant gone further and proposed to call his wife to corroborate his evidence, then that would be evidence in support of the defence of alibi and the evidence should be excluded. Likewise in the example given, the accused is entitled to say that he was travelling at the material time (which is a bare denial) but if he proceeded to produce his ticket or passport to support his alibi but not calling any other witness that would be evidence in support of an alibi and unless pre-trial notice has been given, that evidence should be excluded from the court's consideration.

On the facts of this case, we hold that both the trial magistrate and the appellate judge were in error in excluding the applicant's evidence that he was not involved in the fight and that he was in bed at the material time because this was not evidence of an alibi but a mere denial. Be that as it may, we find that there was ample

evidence to support the conviction and there are therefore no grounds to make any other order.

For the reasons we have stated, we would answer the question in the affirmative provided that the evidence is in support of his alibi and not a bare denial.

Order accordingly.

Solicitors: *Lawrence, Dhillon & Associates.*

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Phon Nam

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CRIMINAL APPEAL NO 66 OF 1986
ABDUL HAMID AG LP, MOHAMED AZMI AND ABDOOLCADER SCJJ
24 JUNE 1987 AND 13 OCTOBER 1988

Criminal Procedure – Charge of trafficking in dangerous drugs – Chemist reports served on accused – Receipt acknowledged by accused – Police officer who served the reports not called – Close of case for prosecution – Application by prosecution to call police officer after close of prosecution case – Refused – Discretion of trial judge to be exercised judicially – Criminal Procedure Code (FMS Cap 6), ss 399 & 425

In this case the respondent had been tried for trafficking in dangerous drugs. The drugs had been sent to the government chemist and had been received back with the two chemist reports. The reports had been served on the respondent pursuant to s 399 of the Criminal Procedure Code (FMS Cap 6) by a detective police constable. The respondent acknowledged receipt by endorsing on the reverse of the reports. At the trial the detective police constable was not called by the prosecution to testify nor was he offered to the defence at the close of the prosecution case. Nevertheless there was evidence to show that the respondent endorsed on the reverse of the reports to acknowledge receipt. When the prosecution closed its case the learned trial judge drew the attention of the learned DPP to the fact that the detective police constable had not given evidence whereupon the DPP applied for leave under s 425 of the Criminal Procedure Code for the court to summon the detective police constable. The learned trial judge after hearing arguments refused the application and acquitted and discharged the respondent without calling for the defence (see [1987] 2 MLJ 262). The Public Prosecutor appealed.

Held, allowing the appeal:

(1) Although the learned trial judge rightly held that the power under s 425 of the Criminal Procedure Code is discretionary, he, however, failed to exercise his discretion judicially.

(2) In the instant case the facts of the case did not justify the refusal by the learned judge. He failed to appreciate that the evidence given by the investigating officer pertaining to the endorsements of receipt of service by the respondent were admissible in evidence. No challenge was in fact made by the defence counsel that the service was not properly effected. Evidence by the detective police constable would therefore be a mere formality to confirm the endorsements that the respondent had made. The learned judge clearly failed to appreciate this and consequently there was a failure to exercise the discretion judicially.

(3) The court is bound to admit fresh evidence under s 425 of the Criminal Procedure Code when it appears essential to a just decision of the case. As the powers under this section are very wide it is therefore necessary that great care be taken when exercising such discretion. However, the second limb of the section being an imperative provision the court must give serious consideration to exercising such powers if in so doing a just and proper decision could be arrived at.

Cases referred to

1 *Maxwell* v *The Director of Public Prosecutions* [1935] AC 309 (refd)
2 *Ramli bin Kechik* v *PP* [1986] 2 MLJ 33 (folld)
3 *Mohd Azam* v *Mohd Iqbal* PLD 1984 SC 95 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 399, 425
Dangerous Drugs Act 1952 s 39B(2)

Cik Su Geok Yiam (Deputy Public Prosecutor) for the Public Prosecutor.

Karpal Singh for the respondent.

Cur Adv Vult

Abdul Hamid Ag LP (delivering the judgment of the court): This was an appeal by the Public Prosecutor against the decision of the learned judge in the High Court at Alor Setar on 1 October 1986 where the respondent was acquitted and discharged without his defence being called. The respondent was tried for trafficking in 128.80g of heroin ('the drug') on 25 October 1983, in contravention of s 39B(1)(a) of the Dangerous Drugs Act No 30/52 (Laws of Malaysia Act 234) and punishable under s 39B(2) of the same Act.

In the course of the trial the investigating officer testified that he received the drug together with other exhibits and personally sent them to the government chemist on 28 October 1983 and 4 April 1984 under seal. He received them back from the Chemistry Department together with two chemist reports (produced and marked as exh P25 and P26) on 14 February 1984 and 7 May 1984. These reports were served on the respondent on 24 May 1984 pursuant to s 399 of the Criminal Procedure Code (FMS Cap 6) by one Detective Police Constable 56729 Yunan. The respondent acknowledged receipt by endorsing on the reverse of P25 and P26. For some reason DPC Yunan was not called by the prosecution to testify nor was he offered to the defence at the close of the prosecution case. Nevertheless there was evidence to show that the respondent endorsed on the reverse of both P25 and P26 to acknowledge receipt.

At that point when the prosecution closed its case the learned judge drew the learned deputy public prosecutor's attention to the fact that DPC Yunan had not given evidence whereupon the deputy public prosecutor applied for leave under s 425 of the Criminal Procedure